CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

NO. 464

INTERSTATE MOTOR FREIGHT SYSTEM, a Michigan Corporation, Petitioner,

v.

MARY MATILDA DUBROCK, Surviving Wife of LEVI FREDERICK DUBROCK, Deceased, as Trustee for Herself and Her Five Minor Children, MARGARET DUBROCK, MAMIE DUBROCK, CALVIN DUBROCK, RICHARD DUBROCK and GERALD DUBROCK, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Interstate Motor Freight System, a Michigan corporation, respectfully petitions your Honorable Court that a Writ of Certiorari issue to review the decision and judgment of the United States Circuit Court of Appeals for the Third Circuit, entered June 16, 1944, affirming the judgment of the District Court of the United States for the Western District of Pennsylvania, entered January 6, 1944, in favor of the Plaintiff-Respondent, and against the Defendant-Petitioner.

Opinions Below.

The opinion of the United States District Court is printed at pages ..... of the record, and is unreported.

The opinion of the Circuit Court of Appeals is printed at pages ..... of the record, and is reported in C. C. A. 143 Fed. (2d) 304.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 16, 1944.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (Sec. 347 of Title 28 USCA).

Questions Presented.

1. Should the judgment in favor of the respondent be set aside and judgment entered in accordance with petitioner's motion for a directed verdict, where the respondent's evidence shows that the respondent's deceased husband in the afternoon of a clear day was operating an automobile in an easterly direction on a three lane highway, and was making a turn to his left in order to leave the highway upon an intersecting road; and that the truck of the petitioner traveling in a westwardly direction, when about 100 or more feet from the intersection had turned from the northern lane of a thirty-three foot highway to the center lane in order to pass behind the automobile making the turn in front of it; and that thereafter the deceased turned back toward his right of the highway when the truck was 20 to 40 feet away and the two vehicles crashed

virtually head-on approximately in the middle lane of the highway?

2. Is the petitioner entitled to a new trial where the Trial Court refused to charge the jury as requested by the petitioner on the doctrine of proximate cause and where the most important element in the case was the question as to what was the proximate cause of the accident?

3. Is the petitioner entitled to a new trial by reason of the Trial Court's charge to the jury that if respondent's husband gave sufficient warning of intention to turn into an intersecting road, the duty rested upon the driver of the truck to bring his truck to a stop under the laws of Pennsylvania?

Statement.

This was an action in trespass originally instituted in the Court of Common Pleas of Armstrong County, Pennsylvania, by the respondent against the petitioner for damages suffered by the respondent by reason of the death of Levi Dubrock, deceased husband of the respondent. The action was removed by the petitioner to the District Court of the United States for the Western District of Pennsylvania. The case was tried in the District Court of the United States for the Western District of Pennsylvania and the jury returned a verdict in favor of the respondent and against the petitioner in the sum of $8,000. The judgment was affirmed by the District Court of the United States for the Western District of Pennsylvania and by the Circuit Court of Appeals for the Third Circuit.

The facts which give rise to the important questions here presented are wholly undisputed and came from evidence produced by the respondent and may be briefly stated as follows:

On November 14, 1941, at about 2:00 o'clock P. M., on a bright clear day, Levi Dubrock, deceased husband of the respondent—accompanied by a friend, Mrs. Moaney—was operating an automobile in an easterly direction on Pennsylvania State Highway Route No. 422 near Kittanning, Pennsylvania. Route 422, at the scene of the accident, is a three lane concrete highway, 33 feet wide, being divided into three lanes of 11 feet each. The road at the location of the accident was straight and practically level for a distance of approximately 1000 feet. On the north side of Route 422, at the scene of the accident, is a connecting dirt road and garage. The deceased intended to make a turn to his left, off Route 422 onto the intersecting dirt road, and when first noticed by two witnesses called by the respondent, he was angling to his left with the left wheels of his automobile either in or about to enter the most northerly third of Route 422. As Dubrock was turning to his left, the same respondent's witnesses noticed the truck of the petitioner traveling in a westerly direction at approximately 40 miles per hour turning from the northerly lane of Route 422 to the center lane. The two vehicles at that time were approximately 100 feet apart. One of the respondent's witnesses called to the deceased, with whom he was acquainted, to look out or get out of the road and the deceased then, instead of continuing off the road to his left—where he would have been perfectly safe—suddenly turned to his right when the truck was 20 to 40 feet away and started back toward the southerly side of Route 422, turning back into the center

lane of the highway and directly into the path of the petitioner's truck. The airbrakes on the truck broke when the vehicles collided and the truck continued some distance down the road.

At the time of the impact according to evidence produced by respondent's witnesses and by the photographs offered in evidence the left hand wheels of the truck of the petitioner were approximately at the dividing line between the center lane and the southerly lane and the two vehicles met practically head-on.

The position of the respondent raises three questions which are clearly within the provisions of Section 240 of the Judicial Code as amended, and within the provisions of Rule 38-5(b) of this Court for the reason that the decision of the Circuit Court of Appeals is contrary to the decisions of this Court, of other Circuit Courts of Appeal and even contrary to a decision of the Circuit Court of Appeals for the Third Circuit.

I. The first question raised is whether under the evidence in the case respondent is entitled to have the case submitted to a jury when the evidence revealed that the proximate cause of the accident was the operation of Dubrock's car. The testimony with regard to the happening of the accident all came from witnesses called by the respondent. There were two eye witnesses to the accident, namely, Reese W. Jenkins, Jr., and Paul Dosch, Jr. Their testimony definitely shows that the sole and proximate cause of the accident was the operation of the car by Levi Dubrock. Their testimony shows definitely that Levi Dubrock was proceeding in an easterly direction on a thirty-three foot highway on the afternoon of November 14, 1941, where the weather conditions were good, and at the point where the acci-

dent occurred the road is straight and practically level and there was visibility for a thousand feet. Dubrock was proceeding in the center lane of traffic and was intending to turn off the highway onto a dirt road to his left. When the two witnesses who were standing near the intersection saw the truck of the petitioner proceeding in an easterly direction at a speed of about forty miles an hour and turning from the northerly lane to the center lane the car which Dubrock was operating was turning to the left from the center lane to the easterly lane and proceeding at about twenty miles an hour. When the truck was about twenty to forty feet away from Dubrock's car one of the witnesses called to Dubrock and Dubrock then swung to his right back into the center lane of traffic and the car and truck collided almost head-on in the center lane. It is obvious that Dubrock was not paying attention to the road ahead of him.

We submit that there was only one cause for this accident and that was the action of Dubrock, who instead of continuing on into the northerly lane of traffic and off the highway suddenly and without any warning turned back to the center lane of traffic directly in front of the petitioner's truck. We submit that the District Court and the Circuit Court should have held under the decisions of this Court that the sole and proximate cause of the accident was the action of Dubrock in the operation of his car.

There is no fundamental difference between the case at bar and the case of *Atlantic Coast Line Railroad Company v. Driggers,* 279 U. S. 787, where the facts show that Driggers, who was a railroad brakeman, swung from a train on which he was riding directly into the

path of a train proceeding in the opposite direction and was killed. The negligence complained of in this case was that the oncoming train was being operated at a high and dangerous rate of speed. This Court held as follows:
(p. 792)

> "The rate of speed at which the passenger train was running was, plainly, not a proximate cause of the injury, as the engine of that train did not run into Driggers, but he, as the result of his own action, was thrown against the side of the engine as it was passing. See Patterson v. Director General 115, S. C. 390, 396."

II. The second question which your petitioner feels is of sufficient importance to allow a Writ of Certiorari in this case arises from the failure of the Trial Judge to charge the jury in accordance with the request of your petitioner. This request was as follows:

> "If the proximate cause of this accident was the deceased turning back toward the right side of the road when the truck had made its turn to pass behind it, then your verdict must be for the defendant."

The Trial Court refused to so charge and granted an exception to your petitioner, and in his opinion with respect thereto merely stated as follows:

> "We believe we previously covered this point by our general charge where we discussed this phase of the case."

The Circuit Court of Appeapls held that your petitioner was entitled to such a charge but that the Trial Court had satisfactorily and adequately covered this subject.

The portion of the opinion of the Circuit Court of Appeals dealing with this point is as follows:

> "From the cases cited by defendant, it is evident he had in mind a charge to the effect that even if the jury found defendant negligent no recovery could be had unless such negligence was also the proximate cause of the accident. There is no doubt under Pennsylvania Law that defendant would be entitled to such a charge. However, the trial judge satisfactorily and adequately covered this subject in the instruction: (R. 99) (12 a)
>
> > 'Now, in order to recover in this case the burden rests upon the plaintiff to show by the fair weight of evidence that the collision that resulted in the death of her husband was due to negligence on the part of the driver of this defendant's truck, and that must be shown by the fair weight of evidence.'
>
> and again (R. 101) (14 a):
>
> > 'If the truck driver was negligent and the collision resulted from the negligence of the truck driver, *and there was no contributory negligence on the part of Dubrock in the operation of his car, then the plaintiff ought to recover in this case.* * * *' (emphasis supplied)"

It is readily apparent that the Trial Judge did not charge on proximate cause. He was charging on negligence and contributory negligence. Obviously a charge on negligence did not submit to the jury the question of what was the proximate cause of the accident. There is no ruling of law which is more definitely settled and which has been imbedded in the law of negligence from the conception of the law of negligence than the doctrine

of proximate cause. This Court clearly stated this doctrine in the case of *Milwaukee and Saint Paul Railway Company v. Kellogg,* 94 U. S. 469 (1876). This was reaffirmed in the case of the *Atlantic Coast Line Railroad Company v. Driggers, supra,* and was definitely and affirmatively reiterated by the Circuit Court of Appeals for the Third Circuit in the case of *Warren v. Haines,* 126 Fed. (2d) 161, where the Court held as follows: (p. 162)

> "Proof of the defendant's negligence is not sufficient, however, to justify a verdict for the plaintiff. There must be evidence that the defendant's negligence was the determinative or proximate cause of the injury."

Clearly, it was not sufficient for the Trial Judge to have submitted to the jury merely the question of negligence and contributory negligence. He must go further and submit the question of what was the proximate cause of the accident and whether the negligence complained of was the proximate cause of the injury. It is readily apparent that this is a question of importance throughout the United States and it is important in the trial of every trespass or negligence case, and clearly the charge was not in conformity with the ruling of this Court or the rulings of the other Circuit Courts of Appeals or even of the Circuit Court of Appeals for the Third Circuit.

III. The third question presented raises the question of the interpretation of the statute of the Commonwealth of Pennsylvania. The Trial Court in its charge to the jury with regard to the duty of petitioner's driver at the intersection when he saw Dubrock give a sufficient warning of his intention to make a left turn

stated it was his duty to stop. The charge of the Trial Court was as follows:

> "If he gave a sufficient warning of his intention to turn into that road, then the duty would have rested with the driver of the truck to have brought his truck to a stop, so that Dubrock would have made his lefthand turn into this intersecting road. Dubrock being dead, there would be a presumption that he took the necessary precautions that he should have taken in order to make that lefthand turn."

The statute of Pennsylvania under which the Trial Court attempted to justify this portion of the charge is as follows:

> "Act of 1929, P. L. 905, Article 1013, its amendments and supplements, Purdon's Statutes Annotated 75, S. 572, Section B—
>
> (b) The driver of a vehicle, street car, or trackless trolley omnibus, approaching but not having entered an intersection, shall yield the right of way to a vehicle within such intersection or turning therein to the left across the line of travel of such first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn as required in this act."

We submit that this is not the correct interpretation of this statute since the statute clearly states what the duty of the driver is, namely, to yield the right of way, which is exactly what your petitioner's driver did in this case. He drove his truck from the northerly lane into the center lane, leaving the entire northerly lane open for Dubrock's car. There is no case that we can find

in Pennsylvania stating that under the law of Pennsylvania, which is the law that should be applied to the case, it is the duty of every driver who sees a car ahead of him making a left hand turn to stop and allow the other car to proceed, where there is sufficient room for him to pass to the left of the oncoming car, particularly where there is a designed and designated lane for passing.

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The opinion below of the Circuit Court of Appeals is reported and appears in the record as shown on page 2 of this Petition. The opinion of the District Court is unreported and appears in the record as shown on page 2 of this Petition.

II.

Jurisdiction.

The Decision of the Circuit Court of Appeals and its Order affirming Judgment was filed June 16, 1944.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (Sec. 347 of Title 28 USCA).

III.

Statement of the Case.

A summary statement of the case is contained in pages 3 to 5 of the Petition filed in this case.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In holding that it was a question of fact for the jury to determine whether the driver of the truck was guilty of negligence and whether the respondent's

deceased husband was guilty of negligence in making this left turn.

(2) In holding that the Trial Court did not err in failing to charge the jury on the doctrine of proximate cause.

(3) In holding that the Trial Court did not err in charging the jury under the law of Pennsylvania that it was the duty of the truck driver to stop and allow the deceased husband to proceed.

V.

Argument.

THE DECISION IN THIS CASE THAT IT WAS A QUESTION OF FACT FOR THE JURY AS TO WHETHER THERE WAS NEGLIGENCE OR CONTRIBUTORY NEGLIGENCE IS IN CONFLICT WITH OTHER CIRCUIT COURTS OF APPEAL AND WITH DECISIONS OF THIS COURT.

It is our opinion that the reasoning of the Lower Court in refusing judgment for the petitioner is clearly erroneous and contrary to the law of State and Federal Courts. For convenience we quote the portion of the opinion of District Judge Kalodner, who wrote the opinion in the United States Circuit Court of Appeals in this particular case:

> "Considering first defendant's motion for judgment n.o.v. we are of the opinion the trial judge was justified in denying it. Considering the evidence in a light most favorable to the plaintiff, we cannot say as a matter of law that the deceased was contributorily negligent, nor that defendant's conduct was not the proximate cause of the accident. It is a jury question whether it is negligence to at-

tempt a left turn at twenty miles per hour in the face of oncoming traffic over 100 feet distant travelling at 40 miles per hour. *Even granting the deceased made a mistake in turning to the right to avoid the collision, such mistake cannot bar recovery unless the emergency was created by the deceased's negligence.* Miller v. Southern Asphalt Co., 171 A. 472, 314 Pa. 289 (1934); Brennen v. Pittsburgh Rys. Co., 323 Pa. 81, 86 (1936); Restatement, Torts, sec. 296. As we said, whether deceased's conduct did give rise to the emergent situation is a question for the jury. *Moreover, it is true, as the trial judge pointed out, that there is a presumption the deceased exercised due care for his own protection.* Johnson v. Hetrick, 300 Pa. 225, 229 (1930); Kriesak v. Crowe, 44 F. Supp. 636, affd. 131 F. (2d) 1023 (C.C.A. 3, 1942)." (Italics ours.)

The Court apparently was of the opinion that the deceased made a mistake in turning to the right to avoid a collision, and this definitely was the petitioner's argument throughout all of the proceedings in this case. The Circuit Court opinion, however, holds that "such mistake can not bar recovery unless the emergency was created by the deceased's negligence." We do not believe this is the law. We believe that the deceased may well have started to make a left turn, which would be a safe left turn, and a turn without negligence, but that when he then turned back to the right, this was the negligent act which defeated his recovery. The cases cited in the Court's opinion are not authority for the proposition as stated, since these cases merely state that such mistake can not bar recovery unless the emergency was created by the deceased's action. IT HAS BEEN OUR POSITION THROUGHOUT ALL OF THE PROCEEDINGS THAT THE

DECEASED PROPERLY STARTED TO TURN OFF THE ROAD AND IF HE HAD CONTINUED THAT PATH THERE WOULD HAVE BEEN NO ACCIDENT. However, when suddenly he decided to go back to the right side of the road, when the petitioner's vehicle had already turned to go behind him, that was the act that created the accident, and that was the negligence that produced the result.

Moreover, we suggest that the opinion in the Circuit Court is based upon the second error, that is, that "there is a presumption that the deceased exercised due care for his own protection." There is no presumption under any law or under any cases pertinent to the facts herein that will corroborate such conclusion. If the respondent's own witnesses had not given us all of the testimony in this case and had not described the accident as herein stated, this statement might be true. BUT WHEN THE RESPONDENT'S OWN WITNESSES DESCRIBED THE ACCIDENT AS HEREIN STATED, THERE WAS DEFINITE EVIDENCE AS TO HOW IT OCCURRED, THERE WAS DEFINITE EVIDENCE OF THE NEGLIGENCE OF THE DECEASED, AND THERE CAN BE NO PRESUMPTION IN THE FACE OF DEFINITE EVIDENCE OFFERED BY THE RESPONDENT HERSELF.

This rule is definitely set forth in the case of *Miller v. Union Pacific Railroad Co.*, 290 U. S. 227:

(p. 233)

> "If, as here, there be no evidence which speaks one way or the other with respect to contributory negligence of the person killed, it is presumed that there was no such negligence. Looney v. Metropolitan R. Co., 200 U. S. 480, 488."

To the same effect is the case of *Rich v. Chicago M. & St. P. Ry. Co.*, 149 Federal Reporter 79:

(pp. 84 and 85)

"Counsel for plaintiff recognizes the foregoing well-settled rules, and in indeavoring to exculpate the decedent from the charge of contributory negligence urge that the instinct of self-preservation is so strong as to create a presumption evidential in its character that the decedent was in the exercise of due care, and that that presumption was sufficient evidence to take the case to the jury. The presumption referred to is like other presumptions of fact. It is available in cases where there is an absence of evidence showing the actual occurrence but like other presumptions it ceases in the light of actual facts. We recognize its evidential value in the former class of cases, as illustrated by Texas & Pac. Ry. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186, and Northern Pac. Ry. Co. v. Spike, 57 C. C. A. 384, 121 Fed. 45, but this court on repeated occasions has recognized and enforced limitations attending its use.

"In Tomlinson v. Chicago, etc., Ry. Co., 67 C. C. A. 218, 134 Fed. 233, 234, it is said that:

'The presumption cannot stand against positive and uncontradicted proof such as was presented in this case, that had he taken those precautions which the law required of him he could plainly have seen the approach of the train in time to avoid the danger. * * * The presumption of the exercise of due care is at variance with the physical facts.'

"In Rollins v. Chicago, etc., Ry. Co., 71 C. C. A. 615, 139 Fed. 639, it is said:

'The presumption that the deceased used due

care is destroyed by the force of physical facts shown by uncontradicted evidence, * * *' etc.

"In Wabash R. Co. v. De Tar, 73 C. C. A. 166, 141 Fed. 932, 934, it is said:

'Because the natural instinct of self-preservation generally prompts men to acts of care and caution when approaching or in the presence of danger, there is, in the absence of credible evidence of the actual fact in any instance, a presumption of the exercise of due care and caution. * * * But it is a presumption of fact, not of law, and, like other presumptions arising from the ordinary or usual conduct of men, rather than from what is invariable or universal, it is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it.' "

In *Heath v. Klosterman,* 343 Pa. 501, 23 Atl. (2d) 209, the Court in an opinion by Mr. Justice Drew held as follows:

(p. 503)

"Even though Doctor Heath is dead and ordinarily a presumption might arise that he exercised due care, this presumption is destroyed in the instant case by the testimony adduced by plaintiff. As held in Watkins v. Prudential Ins. Co., 315 Pa. 497, a presumption such as this is not evidence, and it cannot be weighed as evidence, since it gives way the moment proof to the contrary is presented. This conclusively appeared in the presentation of plaintiff's own case, for the evidence established that Doctor Heath did not look. Moreover, the acci-

> dent having happened in broad daylight, he must have seen the trucks had he looked before stepping out. There can be no presumption as against facts which are proven. In Start v. Fullerton T. Co., 318 Pa. 541, 544, it was said: 'It may be conceded that ordinarily decedent's death would raise a presumption that he had taken all necessary precautions for his own safety, but this presumption has no existence as against the certainty that if he had done so here he would not then have died.' "

From the above, therefore, we find that the Court's opinion is based upon two errors of law and we do not believe that a decision of this importance should be allowed to stand based upon such erroneous statements of the law.

Moreover, the decision is in conflict with the decisions of this Court and the decision of other Courts of Appeal in similar cases. It is readily apparent from the evidence and the photographs offered in evidence by the respondent that the sole and proximate causé of the accident was the operation of the car by Dubrock. There could have been no accident if Dubrock had been watching the road ahead of him and had continued to proceed to his left off the road which had been opened for him by the petitioner's driver. The sole and proximate cause of the accident was the sudden turn by Dubrock to his right from a partially complete left turn into the center of the road when the two vehicles were twenty to forty feet apart when he could have safely proceeded into north lane.

In the case of the *Atlantic Coast Line Railroad Company v. Driggers,* 279 U. S. 787 (1928), it was held as follows:

(p. 792)

"The rate of speed at which the passenger train was running was, plainly, not a proximate cause of the injury, as the engine of that train did not run into Driggers, but he, as the result of his own action, was thrown against the side of the engine as it was passing. See Patterson v. Director General, 115 S. C. 390, 396."

To the same effect is the case of *Southern Railway Co. v. Walters,* 284 U. S. 190 (1931), 52 Supreme Court 58:

(p. 194)

"There is no proof whatever that the alleged failure to stop before entering the crossing was the proximate cause of the plaintiff's injury. Such direct testimony as there is on his behalf indicates a collision between him and the side of the train after the front part of it, which in this case was the rear end of the tender, had passed him, and all of the evidence both for plaintiff and for defendant is consistent with this view of what happened. It is clear that on this ground also a binding direction in favor of the defendant should have been given."

The case of *Warren v. Haines,* 126 Fed. (2d), 161, Circuit Court of Appeals for the Third Circuit, is in our opinion controlling in the case at bar. The Court there held as follows:

(p. 161)

"The plaintiff's husband was killed in a collision between the Pontiac which he was driving and a milk

truck owned by the defendant and operated by his employee. The collision occurred between 6:30 and 7 o'clock on the morning of August 18, 1939. The Pontiac was travelling in a westerly direction and the milk truck in an easterly direction on State Highway No. 28 near the town of North Branch in New Jersey. There is a curve in the road at Burnt Mills Road but at the time of the collision the Pontiac had gone about 250 feet past the curve and the truck had not reached it. The accident took place on the straight-away. At the place of the accident the concrete pavement of the road is 30 feet wide and is divided by a white center line into two 10 feet sections. The milk truck was eight feet wide. A witness for the plaintiff testified that a few seconds before the collision the truck was two feet in from the edge of the road. Asked to give a physical demonstration of the distance he indicated somewhat more than three feet. Assuming the physical demonstration to represent the actual distance, the left wheels of the truck must have been approximately one foot over the white center line. The law of the road requires drivers to keep to the right of the center of the road. The New Jersey statute is in conformity with this rule. The truck was travelling at a speed between 40 and 45 miles an hour. The permissible statutory speed is 20 miles an hour. In our consideration of the case we have not only accepted the testimony that the truck was three feet from the edge of the road and thus partially over the center line, but have also accepted as a reasonable inference therefrom that there was no change in its position relative to the center line

within the few seconds which elapsed from the time the witness first saw the truck until the collision.

"Violations of traffic statutes may be considered by the jury in determining whether the defendant was negligent. Proof of the defendant's negligence is not sufficient, however, to justify a verdict for the plaintiff. There must be evidence that the defendant's negligence was the determinative or proximate cause of the injury. Such a finding in the present case would be based wholly upon speculation or caprice. According to the plaintiff's evidence her deceased husband had all but one foot of his own ten feet wide section of paved road upon which to operate his Pontiac. There is nothing to show that his vision was obstructed or that his side of the road was crowded by other vehicles. There is no evidence that the defendant's truck cut into the path of the Pontiac. Indeed the proof as to the points of contact between the two vehicles and the consequent damages to each of them might well lead one to conclude that the Pontiac cut across the path of the truck. Since the plaintiff has failed to prove any causal connection between the defendant's negligence and the death of her husband it follows that the judgment of dismissal was proper."

The decision is also in conflict with the decisions of the Supreme Court of Pennsylvania under similar circumstances. In the case of *Davidonis, et al, v. The Philadelphia Gas Works Co.*, 347 Pa. 314 (32 Atl. (2d) 304), it was held that there was no liability on the operator of a truck which struck a pedestrian who, having crossed in front of the truck, suddenly turned and

walked into the path of the truck. The Court there held as follows:

(p. 315).

> "There is no evidence here of negligence upon which any liability of defendant can be based. Richard testified that when he first saw the truck it was about fifty feet from Charles. The latter was then within a foot of the rail walking north and had cleared the pathway of the truck; at least there is no evidence to the contrary, and if the fact were otherwise the burden was upon plaintiff's to establish it. When Charles, in response to Richard's call, started back, the truck must have been even less than fifty feet away. The operator had no reason to anticipate that the boy would suddenly retrace his steps."

THE DECISION OF THE CIRCUIT COURT THAT A CHARGE OF NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE CONSTITUTED A CHARGE ON THE DOCTRINE OF PROXIMATE CAUSE IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

There is nothing more definitely settled by the decisions of this Court and the Circuit Courts of Appeal than the question that in order for negligence to be actionable it must be the proximate cause of the accident. Yet the Trial Judge, although specifically requested to charge on the doctrine of proximate cause, refused to so charge but merely charged on the negligence and contributory negligence, which is entirely different from that requested, and it is readily apparent under the facts in this case that the question of proximate cause was the controlling element in the case. This Court held

in the case of *Milwaukee and Saint Paul Railway Company v. Kellogg,* 94 U. S. 469 (1876), as follows: (p. 474).

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact in view of the circumstances attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, as in the oft-cited case of the squib thrown in the market place, 2 Bl. Rep. 892, the question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that the negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

The rule is very definitely laid down by numerous decisions of Circuit Courts of Appeal, some of which are as follows:

Chicago Great Western Ry. Co. v. Price, 97 Federal Reporter 423, Circuit Court of Appeals for the Eighth District:

(p. 430)

"The question whether or not the negligence of the company was the proximate cause of the death of Price was rightfully submitted to the jury."

Shugart v. Atlanta R. & N. Ry., 133 Federal Reporter, 505 (1904).

"It may be conceded that unless this alleged bad condition was a proximate cause of the derailment plaintiff had no case, and the deduction was right. Negligence which does not cause or contribute to an injury is nonactionable. But proximate cause is a question of fact, and a question for the jury if there is substantial evidence from which it may reasonably be deduced that the negligence shown was a proximate cause of the injury complained of."

The question has been definitely passed upon by the Circuit Court of Appeals for the Third Circuit in the case of *Warren v. Haines,* 126 Fed. (2d) 161

(p. 162)

"Proof of the defendant's negligence is not sufficient, however, to justify a verdict for the plaintiff. There must be evidence that the defendant's negligence was the determinative or proximate cause of the injury. Such a finding in the present case would be based wholly upon speculation or caprice.

THE DECISION IN THIS CASE WITH REGARD TO THE DUTY OF THE DRIVER OF THE TRUCK TO STOP IS IN CONFLICT WITH THE STATUTE OF PENNSYLVANIA.

The statute dealing with this question and upon which the Trial Court attempted to justify its charge that it was the duty of the driver of the truck to stop and allow Dubrock to proceed is as follows: Act of 1929, P. L. 905 Article 1013.

> "(b) The driver of a vehicle, street car, or trackless trolley omnibus, approaching but not having entered an intersection, shall yield the right of way to a vehicle within such intersection or turning therein to the left across the line of travel of such first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn as required in this act."

There is no case in Pennsylvania which holds that the words "yield the right of way" necessarily mean to stop. It is readily apparent that the driver of the truck did yield the right of way and had entirely cleared the northerly lane for Dubrock to proceed. Certainly on a three lane highway the driver of a truck who sees a car approaching and making a left turn is yielding the right of way when he swings to the left and opens up the lane of traffic into which the other car is proceeding. This is a common and everyday occurrence.

The Trial Judge certainly was placing upon the petitioner a duty in the operation of the tractor and trailer which the statute did not place upon it; and since the truck did not stop, the Trial Judge was instructing the jury that the petitioner was negligent.

CONCLUSION.

For the foregoing reasons it is submitted that a Writ of Certiorari should issue to the Circuit Court of Appeals for the Third Circuit.

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APPENDIX.

Motor Vehicle Code of Pennsylvania.

Act of 1929, P. L. 905, Article 1013, its amendments and supplements, P. S. 75, S. 572, Section B:

(b) The driver of a vehicle, street car, or trackless trolley omnibus, approaching but not having entered an intersection, shall yield the right of way to a vehicle within such intersection or turning therein to the left across the line of travel of such first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn as required in this act.

(17)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944
NO. 464

INTERSTATE MOTOR FREIGHT SYSTEM,
a Michigan Corporation, Petitioner,

v.

MARY MATILDA DUBROCK, Surviving Wife of Levi Frederick Dubrock, Deceased, as Trustee for Herself and Her Five Minor Children, Margaret Dubrock, Mamie Dubrock, Calvin Dubrock, Richard Dubrock and Gerald Dubrock, Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should the judgment in favor of the Respondent be set aside and judgment entered in accordance with the Petitioner's motion for a directed verdict where the Respondent's evidence shows that Respondent's deceased husband, in the afternoon of a clear day, was operating an automobile at the rate of twenty miles per hour in an easterly direction in the center lane of a three-lane highway and approaching an intersecting highway into which he intended to make a left turn,

after presumably having signalled his intention, and that the truck of the Petitioner, travelling in a westerly direction at forty miles per hour, when about one hundred feet from the Respondent's deceased husband's automobile, which was then occupied by the Respondent's deceased husband, who in attempting to avoid a collision, turned his automobile back toward his right of the highway and a head-on collision occurred, approximately in the middle lane of the highway?

2. Is the Petitioner entitled to a new trial where the Trial Judge refused to charge the jury as requested by the Petitioner that the Respondent could not recover if her husband's negligence was the proximate cause of the accident when the judge had in his general charge instructed the jury that Respondent could not recover if her deceased husband was negligent in any manner?

3. Is the Petitioner entitled to a new trial by reason of the Trial Court's charge to the jury that if Respondent's husband gave sufficient warning of intention to turn left into an intersecting road, the duty rested upon the driver of the truck to bring his truck to a stop, under the laws of Pennsylvania, where the undisputed evidence shows that the Respondent's deceased husband entered the intersection and had a right of way therein and that had the truck stopped and yielded the intersection to the decedent's car, the collision would not have occurred?

II.

COUNTER-STATEMENT OF THE CASE

The Respondent agrees with the facts set forth in the Petition for a Writ of *Certiorari* under the heading of "Statement" (pages 3 to 5), with the exception of the following:

The statement that Dubrock was turning to his left is an incorrect statement of the facts. The eye witnesses to the accident testified that Dubrock was travelling in the center lane of the highway and there was no testimony that he had commenced to make a left turn. The driver of the Petitioner's truck did not testify.

There are no questions presented by the facts and decision in this case that bring it within the provisions of Section 240 of the Judicial Code as amended, and within the provisions of Rule 38-5(b) of this Court. The decision of the Circuit Court of Appeals follows the decisions of this Court, of other Circuit Courts of Appeal and of the Circuit Court of Appeals for the Third Circuit.

1. The first of the three questions raised by the Petitioner is based upon an erroneous interpretation of the facts in the case. There was no evidence that the proximate cause of the accident was the operation of the Dubrock car. The case of *Atlantic Coast Line Railroad v. Driggers,* 279 U. S. 787, is not in point, since there is no similarity between that case and the case at bar.

2. The second question raised by the Petitioner is the failure of the Trial Judge to charge the jury in accordance with the request of the Petitioner, which request the Trial Judge properly refused because the re-

quested charge was not a correct statement of the law. The charge requested is as follows:

> "If the proximate cause of this accident was the deceased turning back toward the right side of the road when the truck had made its turn to pass behind it, then your verdict must be for the defendant."

The Trial Judge properly stated the law to the jury in his instructions, which were approved by the Circuit Court of Appeals for the Third Circuit. The portion of the charge covering this point is as follows:

> "If the truck driver was negligent and the collision resulted from the negligence of the truck driver, and there was no contributory negligence on the part of Dubrock in the operation of his car, then the plaintiff ought to recover in this case."

Under Pennsylvania law, the Respondent would be barred from a recovery if the deceased (Dubrock) was guilty of any negligence, whether his negligence was the proximate cause of the accident or not. In addition to covering the matters requested by the Petitioner, the Trial Judge, in his charge, instructed the jury that in order for the Respondent to recover, it was necessary for her to show that the collision, resulting in the death of her husband, was due solely to the negligence of the driver of the Petitioner's truck. The portion of the charge covering this point is as follows:

> "Now, you have to judge what that situation was, who was to blame for that accident. Should the truck driver have gone farther out around when he saw the other man was going to make a turn? Should he have had his truck sufficiently under control so he could have stopped and let the other man

go by? That is for your consideration. If Dubrock, having once committed himself to the turn, made a turn to the right again, you will have to say whether that would be an act of contributory negligence on his part which would prevent his widow and his children to recover any damages they may suffer by reason of his death. Those are in main the issues of fact as to the negligence. That is the first question you will have to decide.

"*If the truck driver was negligent and the collision resulted from the negligence of the truck driver,* (emphasis supplied) and there was no contributory negligence on the part of Dubrock in the operation of his car, then the plaintiff ought to recover in this case, your verdict should be for the plaintiff. If, on the other hand, there was any act on the part of Dubrock himself which contributed to this accident, which would not have happened had he acted otherwise in view of all the circumstances of the case, then he could be concluded to be guilty of contributory negligence and there could be no recovery in this case at all."

The principles enunciated in the *Milwaukee and Saint Paul Railway Company v. Kellogg,* 94 U. S. 469 (1876), *Atlantic Coast Line Railroad Company v. Driggers, supra,* and *Warren v. Haines,* 126 Fed (2d) 161, were followed by the Trial Judge in the portion of his charge set forth above.

3. The third question raised by the Petitioner is the interpretation of the statute of the Commonwealth of Pennsylvania, relating to the duty of drivers at an intersection. The Trial Judge correctly charged the jury on this subject as follows:

"If he gave a sufficient warning of his intention to turn into that road, then the duty would have rested with the driver of the truck to have brought his truck to a stop, so that Dubrock would have made his lefthand turn into this intersecting road. Dubrock being dead, there would be a presumption that he took the necessary precautions that he should have taken in order to make that lefthand turn."

III.

ARGUMENT

The Decision in This Case That It Was a Question of Fact for the Jury as to Whether There Was Negligence or Contributory Negligence Is Not in Conflict With Other Circuit Courts of Appeal and With Decisions of This Court.

The questions of fact involved in this case are very simple and undisputed.

The Respondent's deceased husband was driving his car in an easterly direction on a three-lane highway approaching an intersecting highway. He was travelling at a rate of speed of twenty miles per hour and had moved from the South lane of the highway in order to make this turn. It can be inferred from what followed that he had signalled his intention of making a left turn off the highway. The Petitioner's truck was travelling in the North lane of the highway in a westerly direction at a rate of speed of forty miles per hour, which is in excess of the legal speed limit for such vehicles in the Commonwealth of Pennsylvania, *Act of May 1, 1919, P. L. 905, Art. X, Sec. 1002, 75 P. S. 501.* Petitioner's truck

was out of control when its driver observed the Respondent's deceased husband's car, and upon reaching a point approximately one hundred feet from the Respondent's deceased husband's car, it swerved to its left into the center lane of the highway, which was then occupied by the Respondent's deceased husband's car. This created an emergency. The Respondent's deceased husband took the only course open to him; that of trying to avoid a collision by turning to his right and clearing the path for the oncoming truck, although he had the right of way in the intersection and should have been allowed by the Petitioner's truck to safely negotiate a left turn off the highway. He did not succeed in getting out of the center lane of the highway in time to avoid the truck and the collision occurred in the center lane of the highway. This testimony was given by two disinterested witnesses who were standing opposite the point of collision. The only other witness to the accident was the driver of the Petitioner's truck, who was not called as a witness by the Petitioners. After the collision, the truck travelled three hundred and ninety-five feet from the point of collision and threw the Respondent's deceased husband's car one hundred ninety-eight feet from the point of the impact. This testimony was given by Anthony Kaleita, a member of the Pennsylvania Motor Police, who arrived at the scene of the accident immediately after the collision and took measurements of the skid marks and distances the cars had travelled.

There was clear evidence of negligence on the part of the driver of the Petitioner's truck. There was no evidence of negligence on the part of the Respondent's deceased husband. Whether the driver of the Peti-

tioner's truck was negligent or whether the Respondent's deceased husband was negligent was a question of fact for the jury and the submission of that question of fact to the jury was not in conflict with the decisions of the Circuit Courts of Appeal or of this court.

There was no definite evidence that the deceased was in any way negligent under the circumstances. Therefore, there is a presumption that he was not negligent.

Miller v. Union Pacific Railroad Co., 290 U. S. 227, page 233:

> "If, as here, there be no evidence which speaks one way or the other with respect to contributory negligence of the person killed, it is presumed that there was no such negligence. Looney v. Metropolitan R. Co., 200 U. S. 480, 488."

The cases cited in Petitioner's Argument, *Rich v. Chicago M. & St. P. Ry. Co.,* 149 Federal Reporter 79; *Tomlinson v. Chicago, etc., Ry. Co.,* 67 C. C. A. 218, 134 Fed. 233, 234; *Rollins v. Chicago, etc., Ry. Co.,* 71 C. C. A. 615, 139 Fed. 639; *Wabash R. Co. v. De Tar,* 73 C. C. A., 166, 141 Fed. 932, 934, are not in point for the reason that in all of the aforementioned cases, there was clear evidence of negligence on the part of the plaintiffs.

In the case at bar, Respondent's deceased husband, travelling at a low rate of speed had moved from the South lane of traffic to the center lane of traffic, as required by the statutes of the Commonwealth of Pennsylvania, and was in the center lane of the highway at the time the collision occurred. Had the Petitioner's truck been under control on its right side of the high-

way, as required by the statutes of the Commonwealth of Pennsylvania, and travelling at a legal rate of speed, the collision would never have occurred.

The action of the driver of the Petitioner's truck would lead any reasonable person to believe that the deceased driver had given a hand signal of his intention to make a left turn into the intersecting highway, thereby supporting the legal presumption that he had used due care. This presumption was not rebutted by any testimony. The failure of Petitioner to put the truck driver on the stand supports the conclusion that the driver's testimony, if given, would show no negligence on the part of the decedent.

The cases cited by the Petitioner in its brief, (pages 18 to 20) are not in point, since the fact situation in those cases are not at all similar to the fact situation in the case at bar.

The Decision of the Circuit Court That the Trial Judge's Charge Covered the Doctrine of Proximate Cause Is Not in Conflict With the Decisions of This Court and Other Circuit Courts of Appeal.

The Petitioner requested the Trial Judge to charge as follows:

> "If the proximate cause of the accident was the deceased turning back toward the right side of the road when the truck had made its turn to pass behind, then your verdict must be for the defendant."

The Trial Judge properly refused this request, inasmuch as it is not a correct statement of the law.

Had the Respondent's deceased husband been guilty of any negligence, that negligence would have been a bar to recovery.

As stated by Judge Kalodner, in his opinion (R. 67):

> "It is difficult to see just how this request would benefit defendant, and, under the Pennsylvania rule, in order to defeat recovery on the ground of contributory negligence, it is not necessary that the negligence be *the* proximate cause, but it is enough if it so contributed to the accident that without it the accident would not have occurred."

The Petitioner did not make a specific request of the Court to charge the jury that the negligence of the driver of the Petitioner's truck must be the proximate cause of the accident for the reason that the Trial Judge had covered that point in his charge: (R. 58)

> "Now, you have to judge what that situation was, who was to blame for that accident. Should the truck driver have gone farther out around when he saw the other man was going to make a turn? Should he have had his truck sufficiently under control so he could have stopped and let the other man go by? That is for your consideration. If Dubrock, having once committed himself to the turn, made a turn to the right again, you will have to say whether that would be an act of contributory negligence on his part which would prevent his widow and his children to recover any damages they may suffer by reason of his death. Those are in main the issues of fact as to the negligence. That is the first question you will have to decide.

"*If the truck driver was negligent and the collision resulted from the negligence of the truck driver,* (emphasis supplied) and there was no contributory negligence on the part of Dubrock in the operation of his car, then the plaintiff ought to recover in this case, your verdict should be for the plaintiff. If, on the other hand, there was any act on the part of Dubrock himself which contributed to this accident, which would not have happened had he acted otherwise in view of all the circumstances of the case, then he could be concluded to be guilty of contributory negligence and there could be no recovery in this case at all."

The Trial Judge's charge followed the principles of the law laid down in the cases cited in the Petitioner's brief, pages 23 and 24. The jury was clearly charged that in order for Respondent to recover, they must find that the negligence of the Petitioner's truck driver was the cause of the collision. This thoroughly covered the question of proximate cause, and the Petitioner does not and could not complain that the charge on contributory negligence was not adequate.

The Decision in This Case With Regard to the Duty of the Driver of the Truck to Stop Is Not in Conflict With the Statute of Pennsylvania.

The statute setting forth the manner in which a vehicle may make a left turn is as follows:

Act of 1925, P. L. 905, Article 1013.

"(b) The driver of a vehicle, street car, or trackless trolley omnibus, approaching but not having entered an intersection, shall yield the right of way to a vehicle within such intersection or turning therein to the left across the line of travel of such

first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn as required in this act."

The decedent had entered the intersection after having presumably signalled his intention of making a left turn. Under these circumstances, it was the duty of the driver of the Petitioner's truck to bring his truck to a stop, since it was not possible for him to yield the right of way to the decedent, unless his truck was brought to a stop. The Judge properly charged, under the facts presented, that the law required the driver of the truck to bring his truck to a stop, so that the decedent could safely negotiate a left turn off the highway. Had the Petitioner's truck yielded the right of way to the decedent at the intersection, as required by the statute, the collision would not have occurred.

Conclusion.

It is respectfully submitted that the decision of the Circuit Court of Appeals does not conflict with the decisions of this Court or with the decisions of the Circuit Court of Appeals for the Third Circuit and other Circuit Courts of Appeal, and does not present important questions of the law requiring the decision of this Court and it is respectfully submitted that the Petition for a Writ of Certiorari should be dismissed.

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